



Understanding an Operating Agreement and Its Amendments

Issue:

This brief explains the function of the operating agreement, how it is used during the verification process, and how it is amended.

(For purposes of this brief, Veteran applies equally to Service-Disabled Veterans; applicant refers to the business entity applying for verification; and participant refers to a business entity that has already been verified.)

The Regulations:

38 CFR § 74.3(b)(2) provides that “[i]n the case of a concern that is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more veterans or service-disabled veterans.”

38 CFR § 74.4(e) provides that “[i]n the case of a limited liability company, one or more veterans or service-disabled veterans must serve as management members, with control over all decisions of the limited liability company.”

What This Means:

An operating agreement is an agreement among members of a limited liability company (LLC) that governs the financial interests, affairs, and the rights and duties of the members to each other and non-members. Some states do not require LLCs to have operating agreements, but those states generally impose certain default requirements by statute that outline the relationship of the members to each other and non-members.

The Center for Verification and Evaluation (CVE) will not require a company to create an

operating agreement if it is not mandated by the State. However, without an operating agreement, comprehensive articles of organization, or some official documentation from the LLC that describes the concern’s governance and ownership structure—CVE must rely upon the default requirements imposed by the State in which the business’ articles of organization are filed, in conducting its examination of the business for the Vendor Information Pages (VIP) database. CVE does not consider letters of explanation as official documentation to establish Veteran ownership or the control functions held by members and managers of the business.

The CVE verification examination is unlikely to find that a firm is eligible for inclusion in the VIP database when there is no operating agreement and there are several owners who are engaged in an ongoing business. CVE relies on each business concern to provide information that CVE examiners can use to understand how the business is controlled.

Amendments to Operating Agreements

Typically, operating agreements may only be amended through specified processes and are therefore not generally subject to alternation or amendment solely by meeting minutes. In most cases, operating agreements are amended by (1) an addendum (executed by the LLC membership) or (2) a complete rewrite of the document that incorporates the proposed amendments. Once executed by the members, the amended operating agreement will then be the controlling document which governs ownership and control of the LLC.

CVE considers the ability to amend the operating agreement to be a business decision that the Veteran must unilaterally control.

Therefore, if the operating agreement contains a provision that requires the approval of the non-Veteran member(s) in order to amend the operating agreement, CVE would find that the Veteran has not demonstrated full control as required by the regulation.

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**VA Office of Small and Disadvantaged
Business Utilization**

1-866-584-2344

Monday–Friday | 8 a.m. to 6 p.m. (Eastern)

Status Update:

verificationfollowup@va.gov

Profile Questions: vip@va.gov